BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Implementation of Section 309(j) of the Communications Act- Competitive Bidding	)	PP Docket No. 93-253
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

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Directed to: The Commission

COMMENTS OF PRAIRIE ISLAND DAKOTA COMMUNITY

The Prairie Island Dakota Community ("Prairie Island"), by counsel, hereby files its Comments in response to the Federal Communication Commission's ("FCC" or "Commission") Further Notice of Proposed Rule Making, released June 23, 1995, in the above-captioned proceeding ("FNPRM"). Prairie Island generally supports the Commission's proposed amendments aimed at addressing the uncertainties raised by *Adarand Constructors, Inc. v. Peña*.[1] These comments will focus on, and further support, the Commission's decision to retain the tribal affiliation exception (the "Exception").[2]

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[1] 63 U.S.L.W. 4523 (U.S. June 12, 1995).

[2] The tribal affiliation exception excludes the gross revenues and total assets of Indian tribes from the calculations for determining whether an affiliated applicant satisfies the entrepreneurs' block financial caps. It also excludes generally, the revenues of Indian tribes for purposes of determining small business eligibility. See Order on Reconsideration, FCC 94-217 (released Aug. 15, 1994) at 1.

The FNPRM states that the Commission "tentatively conclude[s] that the "Indian Commerce Clause" of the United States Constitution provides an independent basis for this exception that is not questioned by the *Adarand* decision."[3] The Indian Commerce Clause has been interpreted to grant Congress broad authority in Indian affairs, including the furnishing of articles, services, and money by the federal government.[4] The broad authority of Congress and, by delegation, the FCC, is an important factor in addressing the concerns raised by *Adarand*. In addition, however, is the critical point, which must be made clear in this context, that the Exception is not a racial remedy, but a political one. Furthermore, it represents at least a partial step by the Commission in fulfilling its trust obligations toward Indian tribes.

The *Adarand* decision requires that all racially based classifications (including those made by the federal government) be reviewed under the strict scrutiny test. The Exception, however, is not affected by *Adarand* because it is, in no sense, a racial remedy of the kind that requires strict scrutiny. Instead, the Exception is an accommodation by the federal government of the interests of the several Indian tribes as sovereign political entities in a trust relationship with the United States.[5] It is, therefore, of a class of legislation long recognized by the Supreme

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[3] FNPRM at ¶20.

[4] Felix S. Cohen, Handbook of Federal Indian Law 212-213 (1982 ed.).

[5] The separate political nature of the tribes was first recognized by the United States Supreme Court in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and is specifically provided for in the so-called Indian Commerce Clause, which authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." See U.S. Const., Article I, Section 2, clause 3

Court as nonracial and legitimate under the United States Constitution. The distinction was made most clearly by Chief Justice Burger in *United States v. Antelope*:[6]

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians. . . . Legislation with respect to [Indian Tribes] has repeatedly been sustained by this Court against claims of unlawful racial discrimination.[7]

In this case, the language of the Exception itself shows that it is not based on a racial classification. The Exception does not create any preference for persons because of their race; it creates a preference for tribes as politically separate entities. Thus, the Exception comes squarely within the category of "classifications expressly singling out Indian tribes as subjects of legislation" that the Court has found to be permissible under the Constitution.

The Commission's expressed rational for the Exception acknowledges this conclusion. In addition, that rational is evidence of the Commission's efforts to fulfill its trust responsibilities with respect to Indian tribes. The Commission recognizes that Indian tribes and Alaska Native Corporations traditionally have access to very little capital and are inherently economically

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[6] 430 U.S. 641 (1977).

[7] Id. at 645. Similar reasoning was applied in Morton v. Mancari, 417 U.S. 535 (1974). The Court recognized the political/racial distinction in upholding an Indian employment preference. The Court explained that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." The Court also noted that "literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 USC) would be effectively erased." Id. at 552.

disadvantaged.[8] In addition, the total assets and revenues of a Tribe are not available for for-profit ventures. As governments, the tribes have social and governmental obligations which claim a large proportion of their limited resources. Elimination of the Exception would work an injustice on tribal participants by precluding most from participating in the Personal Communications Services (PCS) auctions in any meaningful way.

The tribal affiliation exception is not an impermissible racial classification. Rather, it is a remedy based on the relationship between the Indian tribes and the federal government and its trust obligations to the tribes, and is therefore, Constitutionally authorized under the Indian Commerce Clause. The Exception recognizes the distinct disadvantages that the tribes face in participating in the PCS auctions and provides a partial remedy. Federal Indian law,

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[8] See Order on Reconsideration at 1-2.

Presidential[9] and Congressional mandate, as well as basic fairness, all demand that the tribal affiliation exception be maintained.

Respectfully Submitted,

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[9] In a Presidential memorandum dated April 29, 1994, President William J. Clinton stated that "[e]ach executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal Programs, in appropriate circumstances, to address specific or unique needs of tribal communities." William J. Clinton, Memorandum for the Heads of Executive Departments and Agencies, April 29, 1994.